In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ELIAS S. A. DE LIMA ET AL., plaintiffs in error, *v.* GEORGE R. BIDWELL.	No. 456.
SAMUEL B. DOWNES ET AL., plaintiffs in error, *v.* GEORGE R. BIDWELL.	No. 507.
HENRY W. DOOLEY ET AL., plaintiffs in error, *v.* THE UNITED STATES.	No. 501.
HENRY W. DOOLEY ET AL., plaintiffs in error, *v.* THE UNITED STATES.	No. 502.
CARLOS ARMSTRONG, appellant, *v.* THE UNITED STATES.	No. 509.
GEORGE W. CROSSMAN ET AL., appellants, *v.* THE UNITED STATES.	No. 515.

BRIEF FOR THE UNITED STATES.

STATEMENT.

THE CASES.

No. 456. The De Lima Case: Sugars imported from Porto Rico into New York in June, July, and ———, 1899, after ratification treaty of Paris and before passage of Porto Rican act.

De Lima & Co., doing business in New York, imported from San Juan, Porto Rico, during the months of June, July, and ————, 1899, certain sugars, the product of Porto Rico. Upon these sugars the collector at New York demanded and collected the following sums as customs duties:

On the 6th of November, 1899, on the sugars shipped in July, 1899, by the steamer *Salamanca*, the liquidation taking place September 11, 1899	$2,450.58
On the 14th of September, 1899, on the sugars brought during June, 1899, by the steamer *Evelyn*, the liquidation taking place September 11, 1899	5,452.61
On the 1st of September, 1899, on the sugars brought by the steamer *Catania*, the liquidation taking place September 1, 1899	5,242.17

De Lima & Co. sued Bidwell, the collector, as an individual, in the supreme court of the State of New

York to recover back the duties thus paid, amounting in all to $13,145.36, alleging that they were unlawfully demanded, in violation of the Constitution, and collected by duress, the collector exacting the payment of the duties as a condition to the delivery of the sugars. On the petition of the collector, the suit was removed to the circuit court of the United States for the southern district of New York, which sustained a demurrer to the complaint, both on the ground no cause of action was stated and that the court had no jurisdiction. From the judgment dismissing the complaint De Lima & Co. prosecute error from this court.

No. 507. The Downes Case: Oranges from Porto Rico into New York in November, 1900, after the passage of Porto Rican act.

In the month of November, 1900, Downes & Co. imported 576 boxes of oranges, the product of Porto Rico, from Porto Rico into New York—33 boxes from San Juan and 543 from Mayaguez. On November 20, 1900, the collector at New York demanded and collected $659.35 duties on these oranges under the act of April 12, 1900, "To provide revenues and a civil government for Porto Rico." Downes & Co. brought suit in the circuit court of the United States against Bidwell, the collector, as an individual, to recover back this amount, alleging that it had been collected by duress in violation of the Constitution, the collector exacting the payment as a condition to the delivery of the oranges. A demurrer to the complaint, on the ground it did not contain a cause of

action, was sustained. From the judgment dismissing the complaint error has been prosecuted from this court.

No. 501. The Dooley Case: Goods imported into Porto Rico from New York after July 26, 1898, until May 1, 1900, during military occupation and partly before and partly after the ratification of the treaty.

Dooley, Smith & Co. are engaged in business in New York and in San Juan, Porto Rico, being commission merchants, importers of goods from Porto Rico into New York and exporters of goods from New York into Porto Rico.

On April 24, 1898, war was declared to exist between Spain and the United States.

In July, 1898, Porto Rico was occupied by the military forces of the United States

On August 12, 1898, the protocol between Spain and the United States was signed.

On April 11, 1899, ratifications were exchanged and the treaty of Paris proclaimed, by which Spain ceded to the United States the island of Porto Rico.

On April 12, 1900, the act of Congress providing a civil government for Porto Rico was passed, to take effect May 1, 1900.

During the period from July 26, 1898, until May 1, 1900, Dooley, Smith & Co. imported into Porto Rico from New York certain goods, wares, and merchandise upon which the military authorities of the United States in charge of Porto Rico collected $5,374.68, as alleged duties:

First. From July 26, 1898, until August 19, 1898, under the terms of the proclamation of General Miles, directing the exaction of the former Spanish and Porto Rican customs.

Second. From August 19, 1898, until February 1, 1899, under the customs tariff for Porto Rico promulgated by order of the President.

Third. From February 1, 1899, to May 1, 1900, under the amended customs tariff regulations promulgated by order of the President.

Dooley, Smith & Co. brought suit in the circuit court of the United States for the southern district of New York to recover back the amount thus claimed to have been illegally exacted. A demurrer was filed upon the ground that the court had no jurisdiction of the subject of the action, and upon the ground that the complaint did not state facts sufficient to constitute a cause of action. Judge Lacombe sustained the demurrer upon the second ground, under the authority of the decision of Judge Townsend in the Goetze case (103 Fed. Rep., 72). From the judgment dismissing the petition error was prosecuted from this court.

In the assignment of errors (Rec., pp. 13, 14, 15) it is insisted that the imposition and collection of duties in Porto Rico under the order of the President during the period mentioned was in violation of the following provisions of the Constitution:

1. Article 1, section 1, which declares that "All legislative powers herein granted shall be vested in a Congress of the United States."

2. Article 1, section 7, which declares that "All bills for raising revenue shall originate in the House of Representatives."

3. Article 1, section 8, which declares that "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

4. Article 1, section 8, which declares that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

5. Article 1, section 9, which declares that "No tax or duty shall be laid on articles exported from any State."

6. Article 4, section 3, which declares that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States."

7. That portion of the fifth amendment which declares that "No person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation."

8. It was further insisted that the exaction of the duties under the order of the President violated the treaty of Paris, and that at the time of the imposition and collection of duties the island of Porto Rico was a part of the United States.

In holding to the contrary, it is submitted that the lower court erred.

No. 502. The Dooley case: Goods imported into Porto Rico from New York from May 1, 1900, to October 23, 1900, under Porto Rican act.

From May 1, 1900, to October 23, 1900, under the provisions of the act of April 12, 1900, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," the sum of $1,433.11 was collected at the port of San Juan, Porto Rico, as duties on goods, wares, and merchandise shipped from New York by Dooley, Smith & Co. to their agent in San Juan, Porto Rico, the particular provision of the Porto Rican act under which the collection of duties was made being that which provides that "All merchandise coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries" into the United States under the existing tariff, established by the act of Congress of July 24, 1897, commonly known as the Dingley tariff law.

Dooley, Smith & Co. brought suit in the circuit court of the United States for the southern district of New York to recover back the moneys thus declared to have been wrongfully collected from them. To the petition the United States demurred on the ground that

the court had no jurisdiction of the subject of the action, and on the further ground that the complaint did not state facts sufficient to constitute a cause of action. Judge Lacombe sustained the demurrer upon the second ground, under the authority of the decision of Judge Townsend in the Goetze Case (103 Fed. Rep., 72). From the judgment of dismissal error is prosecuted from this court.

In the assignment of errors (Rec., pp. 10, 11), it is insisted that the exaction of duties under the Porto Rican act violated the following provisions of the Constitution:

1. That portion of the eighth section of the first article which declares that "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

2. That portion of the ninth section of the first article which declares that "No tax or duty shall be laid on articles exported from any State."

3. That portion of the third section of the fourth article which declares that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States."

4. That portion of the fifth amendment to the Constitution which declares that "No person shall be deprived of property without due process of law; nor

shall private property be taken for public use without just compensation."

5. The ninth amendment, which declares that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"

6. The tenth amendment to the Constitution which declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

7. It is further urged that the exaction of the duties were in violation of the treaty of Paris.

No. 509. The Armstrong case: Goods imported into Porto Rico from the United States between August 12, 1898, and December 5, 1899, during the military occupation, partly before and partly after the ratification of the treaty.

Armstrong, a subject of the Queen of Great Britain, was engaged in business as a merchant at Ponce, in Porto Rico.

Between August 12, 1898, the date of the signing of the protocol between Spain and the United States, and December 5, 1899, Armstrong imported into Porto Rico from the United States goods, wares, and merchandise which were "of the growth, produce, or manufacture of the United States," or, if of the "growth, produce, or manufacture of a foreign country, had been duly entered and lawful duty paid thereon in some one of the ports of entry of the United States," and paid as duties thereon the total sum of $31,530.65, which

was imposed and collected under the various orders of the President during the military occupation of the island.

Suit was brought in the Court of Claims to recover back the duties thus declared to have been illegally exacted. To the petition a demurrer was filed upon the ground that the court had no jurisdiction of the cause of action, and on the further ground that the petition did not allege facts sufficient to constitute a cause of action. The demurrer was sustained on the second ground. From the judgment of dismissal an appeal was prosecuted to this court.

No. 515. The Crossman case: Liquors imported from Honolulu into New York in April, 1900, after the passage of resolution annexing the Hawaiian Islands and before the passage of the act providing for their government.

The joint resolution "To provide for annexing the Hawaiian Islands to the United States" was passed July 7, 1898.

The act "To provide a government for the Territory of Hawaii" was passed April 30, 1900, to take effect forty-five days thereafter.

In the interim Crossman & Brother imported a consignment of merchandise consisting of whisky, brandy, and jam from Honolulu to New York, the goods being brought by vessel from Honolulu to San Francisco and thence in bond to New York. These goods were entered on April 26, 1900. The collector assessed upon them the rates of duty provided in the act of July

24, 1897, known as the Dingley tariff law. Against the exaction of any duties whatever upon these articles the importers duly protested, declaring that at the time they were shipped from Honolulu via San Francisco to New York the Hawaiian Islands, under the resolution of annexation, had become a part of the territory of the United States and that the imposition of any duties violated the clause of section 8, Article I, of the Constitution declaring that "All duties, imposts, and excises shall be uniform throughout the United States," and also that clause of section 9, Article I, which provides that "No tax or duty shall be laid on articles exported from any State."

The board of appraisers overruled the protest. This decision was affirmed by the circuit court (Judge Townsend). From this judgment an appeal has been prosecuted to this court.

THE QUESTIONS.

It will be perceived that these cases raise the validity under the Constitution of the following exactions:

(1) Duties on goods imported into Porto Rico from the United States during the military occupation of the island and before its cession on April 11, 1899, by the ratification of the treaty. The first Dooley case (No. 501), in which the question was raised by a suit brought in the circuit court of the United States for the southern district of New York to recover back the duties exacted. A demurrer on the ground that no cause of action was stated was sustained. The Armstrong case (No. 509), in which the question was raised

by a suit in the Court of Claims to recover back the duties exacted. A demurrer on the ground that no cause of action was stated was sustained.

(2) Duties on goods imported into Porto Rico from the United States during the military occupation but after the cession of Porto Rico by the ratification of the treaty of Paris on April 11, 1900, and before the passage of the Porto Rican act. The First Dooley case (No. 501) and the Armstrong case (No. 509), just described

(3) Duties on goods imported from Porto Rico into the United States after the ratification of the treaty of Paris (April 11, 1899) and before the taking effect of the Porto Rican act, May 1, 1900. The De Lima case (No. 456), in which the question was raised by a common law action brought in the State court against the collector at New York as an individual. This case was removed into the United States court and a demurrer sustained on the ground it had no jurisdiction, as well as on the ground that no cause of action was stated.

(4) Duties on goods imported from Porto Rico into the United States after the Porto Rican act took effect. The Downes case (No. 507), in which the question was raised by a suit brought against the collector at New York as an individual, in the circuit court of the United States. A demurrer was sustained on the ground that no cause of action was stated.

(5) Duties on goods imported into Porto Rico from the United States after the taking effect of the Porto

Rican act. The second Dooley case (No. 502), in which the question was raised as in the first Dooley case.

(6) Duties on goods imported from the Hawaiian Islands into the United States after the adoption of the resolution of annexation of July 7, 1898, and before the taking effect of the act providing a government for the Territory of Hawaii. The Crossman case (No. 515), in which the question was raised by a protest and appeal under the customs administrative act of June 10, 1890.

ARGUMENT.

I.

JURISDICTION.

The following suggestions are not made for the purpose of securing a disposal of these cases, or any of them, upon purely technical grounds, thus avoiding a decision upon the merits, but in order that the Government may not acquiesce in an improper method of testing the constitutionality of customs exactions. These are class cases, and in view of the diverse courses pursued, the Government is naturally interested in having the correct mode of procedure determined.

The cases are before the court in the following ways:

No. 456, *The De Lima Case:* A common law action against the collector personally, brought in the State court and removed therefrom to the circuit court of the United States.

No. 507, *The Downes Case:* A common law action against the collector personally, brought in the circuit court of the United States.

No. 501, No. 502, *The Dooley Cases:* Proceedings against the United States brought in the circuit court of the United States under the act of March 3, 1887, giving that court concurrent jurisdiction with the Court of Claims.

No. 509, *The Armstrong Case:* A proceeding against the United States in the Court of Claims.

No. 515, *The Crossman Case:* A proceeding in the circuit court of the United States under the customs administrative act of June 30, 1890.

1. Case No. 456, *The De Lima Case* is apparently brought in the manner indicated on the theory that the goods, the subject of the importations in question, are not articles imported into the United States, because Porto Rico, from whence they were brought to the port of New York, is a part of the United States. The case of *In re Fassett* (142 U. S., 479), apparently, has been followed, the question to be determined being, in the view of the plaintiff, whether there was in fact any importation.

It is to be observed, however, that in the *Fassett* case the question determined was whether a vessel built abroad and brought into the United States was "an imported article;" that is, the character of the *thing* was involved. In that case, therefore, the exclusion of the customs administrative act until the question at the threshold of the case was determined was apt and

proper. In Case No. 456 the character of the articles brought into the port of New York is not contested. If imported from any country admitted to be under the jurisdiction of a foreign power, they would unquestionably be dutiable. The only contention is as to the *place* from which the goods proceed. If that place is a part of the United States within the sense of the customs-revenue laws, they are duty free; if not, the duty was properly assessed and collected.

In the enactment of the customs administrative act of June 30, 1890 (26 Stats., 131), Congress provided a system of revenue collection intended to be uniform, exclusive, and exhaustive. That act established a method of procedure, a strict compliance with which was necessary to recover assessments of duty claimed to have been illegally collected upon articles imported into the United States.

Prima facie, the articles herein involved were "importations" when brought into the port of New York. The revenue officers, acting under the authority of the act of June 30, 1890, and following the law and the established practice, proceeded to assess and collect the duty payable under the tariff act of 1897. The act of June 30, 1890, requires the officers of the customs to assess and collect duty upon "all merchandise imported into the United States." The defendant collector, therefore, would not have been justified in disregarding the plain mandate of the law to collect the duties thus *prima facie* payable, upon the claim simply that the place from which they were imported is a part

of the United States and the goods therefore not subject to duty. Having performed the duty which the law required of him he is not responsible personally for his official action, section 25 of the customs administrative act exempting him from liability therefor.

In *Arnson* v. *Murphy* (109 U. S., 240, 243) Mr. Justice Matthews, delivering the opinion of the court, said:

> The common-law right of action to recover back money illegally exacted by a collector of customs as duties upon imported merchandise, rested upon the implied promise of the collector to refund money which he had received as the agent of the Government, but which the law had not authorized him to exact; which had been unwillingly paid, and which, before payment to his principal, he had been notified he would be required to repay; and involved a corresponding right on his part to withhold from the Government, as an indemnity, the fund in dispute. The manifest public inconveniences resulting from this situation induced Congress, by the act of March 3, 1839 (ch. 82, 5 Stat., 348, sec. 2), to alter the relation between these officers and the United States by requiring them peremptorily to pay into the Treasury all moneys received by them officially, without regard to claims for erroneous and illegal exactions. It was provided, however, therein, that the Secretary of the Treasury himself, on being satisfied that, in any case of duties paid under protest, more money had been paid to the collector than the law required, should refund the

excess out of the Treasury. The legal effect of this enactment, as was held in *Cary* v. *Curtis* (3 How., 236), was to take from the claimant all right of action against the collector, by removing the ground on which the implied promise rested. * * *

From this review of the legislation and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in *Elliott* v. *Swartwout* (10 Peters, 137) has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, if not originated by the act of Congress, yet is regulated, as to all its incidents, by express statutory provisions. And among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive.

And in *Schoenfeld* v. *Hendricks* (152 U. S., 691, 693), the court say:

It was decided by this court in *Arnson* v. *Murphy* (109 U. S., 238) that the common-law right of action against a collector to recover duties illegally collected was taken away by act of Congress, and a statutory remedy given, which was exclusive. (*Arnson* v. *Murphy*, 115 U. S., 579; *Cheatam* v. *United States*, 92 U. S., 85.) While the common-law right was outstanding, the collector withheld, as an indem-

nity, the sum in dispute, but Congress provided that he must pay into the Treasury all moneys received officially, and that the Secretary of the Treasury should refund erroneous and illegal exactions. A suit to recover back an excess of duty necessarily could only be maintained as affirmatively specified in the statute. (Rev. Stat., 2d ed., sections 2931, 3010, 3011, 3012, 3012½, 3013; act of February 27, 1877, c. 69, 19 Stat., 240, 247; *Hager* v. *Swayne*, 149 U. S., 242, 244.)

Section 3011 of the Revised Statutes, which authorized an action against a collector to recover money paid as duties "when such amount of duties was not, or was not wholly, authorized by law," was repealed by section 29 of the act of June 10, 1890, as were also sections 2931, 3012, 3012½, 3013, and the remedies substituted which these importers did not see fit to pursue. Moreover, section 25 of that act provided: "That from and after the taking effect of this act no collector, or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act."

This section exempted the collector from suit in respect of any rulings or decisions as to the classification of merchandise; the duties charged thereon; the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which the importer might under the act be entitled to appeal from the decision of the collector or other officer, or from any board of appraisers provided for in the act; and its operation is not confined to rulings and decisions of the collector from which an appeal lies ultimately to the circuit court.

We held in *Passavant* v. *United States* (148 U. S., 214), that the act of June 10, 1890, conferred no jurisdiction upon circuit courts of the United States, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers ascertaining and fixing the dutiable value of imported goods, when such board has acted in pursuance of law, and without fraud or other misconduct from which bad faith could be implied; but it does not result from that conclusion that in such cases the collector is still subject to suit.

In *In re Fassett, petitioner* (142 U. S., 479), the question arose as to whether a British-built steam pleasure yacht, purchased in England by a citizen of the United States, and duly entered at the port of New York, was liable to duty as an imported article; and it was held that, as the owner, in order to have the benefit of proceedings under the act of June 10, 1890, would have been obliged to concede that the vessel was imported merchandise and to make entry of her

> as such, which was the very question in contention, he had pursued the proper remedy by filing his libel in the district court of the United States for the southern district of New York, which had jurisdiction of the vessel, under the circumstances disclosed, by virtue of section 934 of the Revised Statutes.

In the case last referred to by the court it is to be observed that there had been no collection of duties by the collector and immediate payment thereof by him into the Treasury. In the present case the amount collected was paid into the Treasury, so that the reason of the rule established by *Arnson* v. *Murphy* applies here.

2. No. 507, *The Downes case:* This is a similar common-law proceeding against the collector personally, but brought in the circuit court of the United States instead of the State court. What has just been said in relation to common-law jurisdiction applies to this case.

In addition it is to be observed that the amount sued for in this case is $659.35 (Rec., p. 4). It is submitted that, as there is involved less than $2,000, the circuit court had no jurisdiction of the case. In *Holt* v. *Indiana Manufacturing Company* (176 U. S., 72, 73) the Chief Justice, speaking for the court, said:

> The language of the first section of the act of March 3, 1887, as corrected by the act of August 13, 1888, is: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several

States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. * * *" This was carefully considered in *United States* v. *Sayward* (160 U. S., 493), and it was held that the sum or value named was jurisdictional, and that the circuit court could not, under the statute, take original cognizance of a case arising under the Constitution or laws of the United States unless the sum or value of the matter in dispute, exclusive of costs and interest, exceeded $2,000. That decision was reaffirmed in *Fishback* v. *Western Union Telegraph Company* (161 U. S., 96, 99). And the conclusion reached is not affected by the fact that the operation of the act of March 3, 1891, was to do away with any pecuniary limitation on appeals directly from the circuit courts to this court (*The Paquete Habana*, 175 U. S., 677).

3. In case No. 501, *The Dooley case, No. 1*, and case No. 509, *The Armstrong case*, the duties were collected by the military authorities in Porto Rico on goods brought from the United States into the island, partly before and partly after the ratification of the treaty, but, in every instance, prior to the taking effect of the Porto Rican act. The revenues thus collected were used by the military authorities for the benefit of the provisional government.

In case No. 502, *The Dooley case No. 2*, the

duties were collected by the insular government, under the Porto Rican act, on goods imported into Porto Rico from the United States after May 1, 1900, the resulting revenues being applied to the use of the insular government.

Case No. 509, *The Armstrong case*, was brought in the Court of Claims; cases Nos. 501 and 502, *The Dooley cases*, were brought in the circuit court of the United States under the act of March 3, 1887, giving that court, in certain cases, concurrent jurisdiction with the Court of Claims.

If either or all of these three cases involve, wholly or in part, the collection of revenue, and are, therefore, revenue cases, what this court said in *Nichols* v. *United States* (7 Wall., 129), applies:

> But after all, the important subject of inquiry is, Did Congress, in creating the Court of Claims, intend to confer on it the power to hear and determine cases arising under the revenue laws?
>
> The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the Government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with dispatch, and that the officers of the Treasury should be able to make a reliable estimate of means, in order to meet liabilities. It would be difficult to do this, if the receipts from duties and internal taxes paid into the Treasury, were liable to be taken out of it, on suits prosecuted in the

Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be, that the Treasury estimates for any current year would be unreliable. To guard against such consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a *system*, which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. * * *

The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws.

Without pursuing the subject further, we are satisfied that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims.

As bearing upon the question whether these are revenue cases, it may be stated that, following section 14

of the act approved April 12, 1900, providing revenues and a civil government for Porto Rico (31 Stats., 77), the customs laws of the United States not locally inapplicable are applied to Porto Rico. The provisions of the customs administrative act of June 10, 1890, are in all respects in force and effect in Porto Rico in so far as affects importations into that country from foreign countries. Said provisions apply in the case of merchandise going into Porto Rico from the United States and coming into the United States from Porto Rico, except in so far as affects invoices. There being no consuls of the United States in Porto Rico, and no consular representatives of Porto Rico in the United States, the provisions of the customs administrative act in relation to consular invoices are necessarily inapplicable, and the shipper's certificate is accepted in lieu thereof as sufficient authentication. The customs regulations of the United States when not locally inapplicable are also in force and effect in Porto Rico.

On the other hand, if they are not to be regarded as revenue cases, they are cases sounding in tort, and come under the rule.

The essence of the claim in this case is that the goods of the claimant were not imported articles, and therefore not subject to the payment of the duties assessed. But if this is so the act of the Government officers in seizing and holding the goods was unquestionably tortious. (*In re Fassett*, 142 U. S., 479, 483.)

The claimant could not waive the tort and sue to recover the duty paid as upon an implied contract.

In *Hill* v. *United States* (149 U. S., 598), this court, speaking by Mr. Justice Gray, said:

> The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract. (*Gibbons* v. *United States*, 8 Wall., 269, 274; *Langford* v. *United States*, 101, U. S., 341 346; *United States* v. *Jones*, 131 U. S., 1, 16, 18.)

However just it may be that a person whose property or money has been tortiously obtained by the Government should have redress therefor, it is apparent that no jurisdiction has been conferred upon any court to grant it.

In *Gibbons* v. *United States (supra)*, this court said:

> But it is not to be disguised that this cause is an attempt, under the assumption of implied contract, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves torts. * * * The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the Government founded on torts.

And in the case of *Langford* v. *United States* (*supra*, p. 345), it was said:

> There can be no reasonable doubt that this limitation to cases of contract, express or im-

plied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

See also *Schillinger* v. *United States* (155 U. S., 163); *United States* v. *Berdan* (156 U. S., 566).

What this court has said of the jurisdiction of the Court of Claims in this respect is equally true of the jurisdiction of the circuit court under the concurrent jurisdiction act.

4. Case No. 515, *The Crossman case:* If our contention as to the general application of the customs administrative act as a remedy in all cases where customs duties are alleged to have been illegally collected is unsound, and it is held that the proper course is an action against the collector personally to determine whether there has been an importation at all, it is apparent that the appellant in this case has mistaken his remedy. He has proceeded in accordance with the provisions of the customs administrative act, notwithstanding his claim that the goods are not an importation into the United States.

II.

DUTIES EXACTED IN PORTO RICO BY THE PRESIDENT PRIOR TO THE TREATY.

The duties imposed in Porto Rico by Executive orders during the military occupation of the island prior to the ratification of the treaty of peace were rightfully levied by the President, as Commander in Chief, acting

under belligerent right, at a time when hostilities had only been *suspended, not terminated*, between Spain and the United States, and when Porto Rico had not been ceded to the United States, and when the right and obligation of conducting a civil government by the military authority was imposed upon the President. I am at a loss to perceive any reasonable ground for opposing the validity of these exactions. The brief in the first Dooley case (No. 501), in which the question is raised, has not yet been received. The brief in the Armstrong case (No. 509) attacks the authority of the President to issue the Executive orders providing for the collection of duties on goods imported into the island, denouncing them as a usurpation of legislative power "in a time of peace and after Porto Rico, as we claim, was a part of the United States." (Brief, p. 52.)

The Executive orders referred to were promulgated on August 19, 1898, and January 20, 1899, after the signing of the protocol on August 12, 1898, and before the ratification of the treaty of peace on April 11, 1899.

It appears therefore that the position of counsel for Armstrong, logically stated, is as follows:

First. By the protocol Porto Rico was ceded to and became a part of the United States.

Second. That the suspension of hostilities which followed the signing of the protocol ended the war and brought about peace.

Third. That consequently an end was put to the authority of the President to govern Porto Rico under the war power.

These propositions seem so absurd, that to state them is to refute them. I must therefore beg the pardon of the court for further discussing this phase of the case.

Certainly the protocol did not cede Porto Rico to the United States; it merely promised to make the cession. The second article says, "Spain *will* cede to the United States the island of Porto Rico," etc. The cession did not take place until the ratification of the treaty of Paris. Until that treaty was ratified Porto Rico did not become either a part or a possession of the United States, and Congress was absolutely without authority to legislate for it.

Neither did the protocol end the war between Spain and the United States. It does not pretend to do so. It provides that upon the signing of the protocol "hostilities between the two countries shall be *suspended*," not terminated. The United States and Spain are each to appoint not more than five commissioners "to treat of peace, and the commissioners so appointed shall meet at Paris not later than October 1, 1898, and proceed to the negotiation and conclusion of a treaty of peace, which treaty shall be subject to ratification, according to the respective constitutional forms of the two countries."

Hostilities were suspended, not terminated, by the protocol, and a treaty of peace was to be negotiated, subject to ratification according to the respective constitutional forms of the two countries. Until the treaty was so concluded and ratified a state of war still

existed. In the event of a failure to conclude and ratify a treaty of peace, the suspension of hostilities under the protocol would have ceased and active military operations would have been resumed.

This brief statement is sufficient to show how utterly baseless are the claims that the protocol concluded peace and made Porto Rico a part of the United States, thus terminating the power of the President to issue Executive orders for the temporary government of the territory occupied by our military forces.

The claim that the President was exercising legislative power in issuing the Executive orders providing for customs regulations for Porto Rico is equally without reason or authority. Counsel seem to think that under the war power all the President can do is to fight. When we go into a war, of course we fight, but we fight to force a peace, and to gain that end we invade the enemy's territory and conquer and hold it until peace is concluded. After we conquer territory we necessarily cease to fight, but we have to hold and occupy it pending the negotiation and ratification of the treaty, and in holding and occupying it we must govern it. The war power that is used in holding and occupying conquered territory is not limited by the needs of the Army in its military operations, but extends to the creation and maintenance of a civil government for the occupied territory which will preserve peace and order, furnish security for life and property, and provide revenue, if desirable, for supporting this provisional government. Upon the occupation of

Porto Rico by our arms, and after the signing of the protocol, the relation of the island to Spain and to Cuba and to the United States, was materially changed. Under the Spanish customs laws in force when our troops occupied Porto Rico, the island traded almost entirely with Spain and Cuba. This course of trade necessarily ended with the war. A modification of the Spanish customs was therefore essential and could not be made except by Executive order. The amended customs regulations were intended to meet the new conditions, promote as far as possible the welfare of the island, as well as to provide to some extent revenue to support the provisional government. For instance, in the promotion of trade between the United States and Porto Rico, the Executive orders placed all food supplies, implements of industry, machinery, etc., going from the United States into Porto Rico, upon the free list.

The authority of the President to govern territory acquired under the war and treaty making power until Congress sees fit to act is amply sustained by the decisions of this court. While the source of this authority is belligerent right, the authority itself is not limited to purely military matters, but extends to the regulation of civil affairs within the occupied territory. The object of the President is to establish and maintain a provisional civil government for the preservation of order and the protection of life, liberty, and property pending the action of Congress. Substantially all those things which can be dealt with by a civil government when established by Congress

may be regulated by the provisional government itself during the so-called military occupation. The source of authority in the case of a provisional government is the President, the laws and ordinances are the Executive orders, the courts and officers are in a sense military tribunals and agencies; but all the means of carrying on a civil government are provided, and the action of these authorities in preserving order and advancing the interests of the people of the territory is as valid and effective as if they had back of them the legislative instead of the Executive power of the United States. Indeed, history shows that the President has endeavored, in ruling temporarily newly acquired territory, to blaze the way for Congress by establishing a provisional government, with laws and ordinances, that might substantially be continued. And Congress has recognized this fact in the past, and indeed in the present instance, by virtually ratifying the action of the President. Under the Porto Rican act of April 12, 1900, the military orders were continued in force as laws and the civil courts made the successors of the so-called military tribunals.

In support of the broad authority of the President during military occupation to establish a provisional civil government with full powers which shall be continued in force until the Government created by Congress takes hold, I refer the court to the following cases:

Cross v. *Harrison*, 16 How., 164. (1853.)

Suit to recover back money paid to Harrison, collector at San Francisco, from February 3, 1848, to November

12, 1849. On February 3, 1848, the treaty between Mexico and the United States was signed. On March 3, 1849, an act of Congress was passed creating the collection district of California. On November 12, 1849, the collector appointed under this act arrived at San Francisco and entered upon his duties. Harrison was appointed collector under the military occupation prior to the treaty of peace, and the question was whether he had authority to act after the treaty of peace and until the collector appointed under the act of Congress assumed charge.

The conclusion of the court is thus stated by Mr. Justice Wayne, page 195:

> Our conclusion, from what has been said, is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and, that until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason.

The reasons for this conclusion are thus stated, page 193:

> The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the

United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The Government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the Government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government. And the more so as it was continued until the people of the Territory met in convention to form a State goverment, which was subsequently recognized by Congress under its power to admit new States into the Union.

Leitensdorfer et al. v. *Webb*, 20 How., 176 (1857).

Upon the acquisition, in 1846, of New Mexico by conquest, General Kearny, then in command, established a provisional government with a judicial system for the preservation of order and the protection of life and property in the Territory. The treaty of peace which ended the war with Mexico confirmed the possession of the United States, and the provisional government continued in force until, on September 9, 1850, the act of Congress was approved establishing a Territorial government for New Mexico.

This suit was a proceeding by writ of attachment brought in a court of the provisional government and subsequently, in 1851, under the provision of the act establishing the Territorial government, transferred to the district court for the Territory. While it was conceded that the provisional courts had jurisdiction during the war, it was contended that upon the termination of the war and the cession of the territory by the treaty of peace, the provisional government terminated. Respecting this contention the court, speaking by Mr. Justice Daniel, said, page 178:

> The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the ordinances and institutions of the pro-

visional government would be revoked or modified by the United States alone, either by direct legislation on the part of the Congress, or by that of the Territorial government in the exercise of powers delegated by Congress.

The Grapeshot, 9 Wall., 129 (1869).

The original suit was a libel on a bottomry bond, brought in the district court of the United States for the district of Louisiana before the civil war. A decree was rendered in that court from which an appeal was taken to the circuit court, where the case was pending when the proceedings of the court were interrupted by the war. In 1862, when the troops of the United States occupied New Orleans, a provisional court was established, to which the cause was transferred, and again a decree was rendered in favor of the libellants. After the war, by act of Congress, the jurisdiction of the circuit court being reestablished, all decrees of the provisional court were transferred to it.

The court, Chief Justice Chase delivering the opinion, sustained the authority of the President in establishing the provisional court. The cases of *Leitensdorfer* v. *Webb*, *Jecker* v. *Montgomery*, and *Cross* v. *Harrison* are cited with approval as illustrations of the principles applicable to military occupation.

Page 133:

> We have no doubt that the provisional court of Louisiana was properly established by the President in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and the disso-

> lution of the provisional court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States.

Mechanics' Bank v. *Union Bank*, 22 Wallace, 276 (1874).

In May, 1862, on the occupation of the city of New Orleans by the Federal forces, General Butler issued an order establishing a provost court, consisting of a military officer. This court took jurisdiction of a suit brought by one New Orleans bank against another, involving a large sum of money. The authority of the general in command to establish a military court with civil jurisdiction came before the Supreme Court and was sustained. Stating the question, the court, speaking by Mr. Justice Strong, says (bottom p. 294):

> The controlling question is whether the commanding general of the army which captured New Orleans and held it in May, 1862, had authority after the capture of the city to establish a court and appoint a judge with power to try and adjudicate civil causes. Did the Constitution of the United States prevent the creation of civil courts in captured districts during the war of the rebellion, and their creation by military authority?

The court then says, "This can not be said to be an open question," and after citing the cases of *The Grapeshot, and Leitensdorfer* v. *Webb* (*supra*), concludes (bottom p. 296):

> In view of these decisions it can not be questioned that the Constitution did not prohibit the

creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts is but the exercise of the ordinary rights of conquest. The plaintiffs in error, therefore, had no constitutional immunity against subjection to the judgments of such courts.

In the leading case of *United States* v. *Rice* (4 Wheaton, 246), the authority of the military authority occupying conquered territory to impose such duties on goods imported into it as it sees fit, is sustained, although in that case the occupied territory was the town of Castine, Me., and the military authority was the British Government, which conquered and occupied it temporarily during the war of 1812. Mr. Justice Story, speaking for the court, says (p. 253):

> During this period the British Government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself. * * * The sovereignty of the United States over the territory was, of course, suspended. * * * By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws,

to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British Government chose to require.

III.

DUTIES EXACTED IN PORTO RICO ON GOODS FROM THE UNITED STATES BY THE PRESIDENT AFTER THE TREATY AND PENDING ACTION BY CONGRESS.

Upon our occupation of Porto Rico it was necessary for the President to provide for the civil government of the island. This he did, acting under the war power. This government, as far as possible, met every need of the island and its inhabitants thus put under our care pending the conclusion of the treaty of peace. It was necessary to have a government to preserve order and protect life and property, and so far as practicable the government instituted by the President under the military power covered the entire field which needed regulation. The provisional government thus established was in force when the treaty was ratified. It was the only government there. The treaty itself provided no government for Porto Rico. Congress, of course, had not yet acted; yet the contention is, that as soon as the treaty was ratified the authority of the President to govern Porto Rico through the existing provisional government, with its laws and ordinances, courts and officers, came to an end. By the cession, it is insisted, Porto Rico became a part of the United States, to be governed by Congress under the limitations of the Constitution applicable to the United

States; but how governed until Congress should act, they do not attempt to explain.

I shall discuss later the effect of the treaty. I have already cited the cases which sustain not only the authority of the President to institute provisional governments in conquered territory, but to continue those governments after the cession, pending the action of Congress providing a civil government. As Mr. Justice Wayne said in the case of *Cross* v. *Harrison* (16 Howard, 193):

> It [the provisional government] was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed.

And in the language of the court, speaking by Mr. Justice Daniel, in *Leitensdorfer* v. *Webb* (20 Howard, 176, 178):

> The ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the Territorial government in the exercise of powers delegated by Congress.

Assuming that, under the authorities, the provisional

government was lawfully continued until Congress provided a civil government in its place, the only other question is whether, after Porto Rico was ceded to the United States, duties could be rightfully imposed upon goods imported into Porto Rico from the United States. The revenues derived from the collection of these imposts were applied by the military authorities to the support of the insular government. I am not sure whether this fact appears in the pleadings, but it is true, nevertheless. The question, then, is identical with that which arises in the second Dooley case (No. 502), where goods were imported into Porto Rico from New York from May 1, 1900, to October 23, 1900, under the Porto Rican act, and I shall discuss it in that connection.

IV.

DUTIES COLLECTED IN THE UNITED STATES ON PORTO RICAN GOODS UNDER THE DINGLEY LAW AFTER THE TREATY AND BEFORE THE PORTO RICAN ACT.

The De Lima case (No. 456), growing out of the collection of duties on goods imported from Porto Rico into New York in June, July, and ————, 1899, after the ratification of the treaty of Paris and before the passage of the Porto Rican act, which took effect May 1, 1900, raises the questions already so fully discussed in the Goetze case.

It is not my purpose to repeat the able and elaborate historical argument presented on behalf of the Government in that case. I desire, however, in my own way, to lay before the court some considerations which seem

to me to be pertinent in the determination of the matters submitted.

Reduced to a legal proposition, the denial of the power which is being exercised by the President and by Congress in the new territories, amounts to this: Ceded territory becomes by the act of cession an integral part of the United States, to which the Constitution of its own force at once applies, placing its people, its products, and its ports on an immediate equality with ours, and conferring upon them all the rights, privileges, and immunities enjoyed under the Constitution by the people, the products, and the ports of the several States. Moreover, the limitations of the Constitution apply there as here, requiring the same taxes, imposts, duties, and excises to be collected and the same Anglo-Saxon system of trial by jury to be used. Their people become at once our people, citizens of the United States; our ports become their ports, and our markets their markets; they are free to come here or to sell their products here, while our taxes and our laws, however unsuitable, must go there.

There is nothing obscure about this doctrine. It is plain and unmistakable. The act of cession is all powerful, its effect immutable. As soon as the title passes, the territory is incorporated within the United States, and the Constitution, *ex proprio vigore*, does the rest. The proposition is true as stated or not true at all. Either the mere act of cession, irrespective of the terms of the treaty, and regardless of the action of Congress, makes acquired territory a part of the United

States in the constitutional sense, or it does not. If it does, the treaty-making power, in acquiring territory, is necessarily limited to providing for the mere act of cession. It can make no terms; it can not take temporarily or provisionally, or for this purpose or that; it can give no pledges; it can grant no privileges; it can reserve no questions for future disposition; in short, although called the treaty-making power, and granted without limitation, it is stripped of its proper functions, it can not treat, it is lame, impotent, impossible, ridiculous.

On the other hand, if the territory does not, by the mere act of cession, become immediately an integral part of the United States in the constitutional sense, of necessity the provisions of the treaty and the action of Congress must determine whether it shall or shall not become or be deemed a part of the United States, and if ever, when. In other words, the acquired territory becomes not a part but a possession of the United States, territory belonging *to* the United States, and its disposition and government rest, under the Constitution, with the treaty-making power and with Congress. The President can not extend the boundaries of the United States. It takes the legislative power to do so, and it may do so upon what terms it deems best.

In the noted case of *Fleming* v. *Page* (9 How., 603, 614), Chief Justice Taney says that the United States "may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the

Government for the expenses of the war." If territory may be acquired for such purpose, it certainly may be taken and held upon such terms and conditions as may be proper and necessary to carry the purpose into effect. Territory acquired to indemnify and reimburse may be taken and held as a pledge or as a possession, provisionally or indefinitely, with the reserved power of disposition and control suitable to accomplish the desired end. To incorporate such territory into the Union and make it a part of the United States would defeat the very object of the acquisition. Once there it would have to stay, for no power exists within the Union to dismember it.

If Chief Justice Taney was wrong and we can not take territory *sub modo*, to indemnify or reimburse us, but only to make it a part of the United States, then before the President carries a war into the enemy's country he should send a commission ahead of the Army to ascertain and report whether the territory he proposes to invade and conquer is fit to be made a part of the United States, for neither the treaty-making power nor Congress can prevent that result if a cession follows conquest. Before the President sent Dewey to Manila, he should have satisfied himself that the Philippines were suitable for incorporation into the Union, for we could destroy the Spanish power there only at the risk of having to assume the burdens of sovereignty ourselves.

The Constitution, while vesting in the President and Senate the treaty-making power, provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." (Article VI.) The treaty of Paris was made "under the authority of the United States," and contains the terms upon which we acquired these Territories. It is unique in this, that while former treaties of cession all provided that the civilized inhabitants of the ceded territories should *ultimately* become citizens, not *immediately*, of the United States, this treaty left the determination of their civil rights and political status to Congress. Let me refer to a few pertinent provisions.

Spain ceded to the United States Porto Rico, Guam (article 2), and the Philippines (article 3). Spanish subjects, natives of the Peninsula, residing in such tertories, were given one year from the exchange of ratifications; that is, until April 11, 1900, to preserve their allegiance to Spain by making a declaration in a court of record. In default of this, they were to be held to have adopted, not the nationality of the acquiring power, but the "*nationality of the territory in which they may reside*" (article 9) Then comes this striking provision:

> The civil rights and political status of the native inhabitants of the territories hereby ceded

to the United States shall be determined by the Congress.

Spaniards residing in the territories were to be "subject to the jurisdiction of the courts of the country," not the courts of the United States, "pursuant to the ordinary laws governing the same" (presumably the Spanish or civil law), and were to have the right to appear and pursue the same course therein "as citizens of the country to which the courts belong" (article 11), not as citizens of the United States.

For ten years Spanish ships and merchandise were to be admitted to the ports of the Philippines on the same terms as ships and merchandise of the United States (article 4), and for ten years Spanish scientific, literary, and artistic works were to be admitted free of duty into all the ceded territories (article 13). Neither of these provisions can be carried out if the Constitution requires our customs regulations to apply there as here.

The purpose of these provisions is plain. Although under the power and protection of the United States, the territories are to have their own laws, their own courts, their own ports, their own commerce, their own citizenship, their own system of revenue. A separate and distinct existence under, but *without*, the United States is contemplated. The parties to the treaty both knew that the location and condition of these islands would not permit their incorporation into the United States and the application to them of those laws of commerce, of revenue, and of civil and criminal procedure, which the Constitution requires to be uniform

throughout the United States. They provided, therefore, for a system of government which should be adapted to local conditions and needs. Are we free to disregard the plain provisions of the treaty which the Constitution says shall be the supreme law of the land? If so, what becomes of the consent of the treaty-making power to the acquisition? Would the President and the Senate have consented to take the territories upon any other terms? Would Spain have consented to cede them?

Certainly the treaty never intended to make these tropical islands a part of the United States in the constitutional sense, and just as certainly did make them a part of the United States in the international sense. The term "the United States" may mean the territory which governs or the territory over which the government extends. The former is the constitutional, the latter the international, or it may be the legislative, sense. In the latter sense, States and Territories, all places subject to the jurisdiction of the national power, combine to constitute what Chief Justice Marshall, in *Loughborough* v. *Blake* (5 Wheaton, 317, 319) (1820), termed the "American Empire," "Our Great Republic."

"Does this term," said he, referring to the "United States," "designate the whole, or any particular portion of the American Empire? Certainly this question can admit of but one answer. It is the name given to our Great Republic, which is composed of States and Territories." The great Chief Justice was clearly correct in holding that the taxing power extends throughout

the United States in the international sense, although the limitation of the Constitution on the taxing power applies, as we contend, only throughout the United States in the constitutional sense. What we are concerned with is the constitutional sense, for the vital question is whether the limitations and prohibitions which under the Constitution apply throughout the United States, operate in our new territories.

THE CONSTITUTION.

As stated in its Preamble, the Constitution of the United States was ordained and established by "the people of the United States" "for the United States of America." There is no ambiguity about the meaning of the words "United States of America" as here used. They mean the States united under the Constitution, and are named individually in the second section of the first article. They were the thirteen Colonies which had first become United States in the Declaration and under the Confederation, and which, through their people, framed the present Constitution in order, among other things, to form a more perfect Union. This conclusively appears from the sixth article, which provides that all debts contracted before the adoption of the Constitution "shall be as valid against the United States under the Constitution as under the Confederation."

The fact is not to be lost sight of that the primary source of sovereign power was the people of the thirteen original States. These men believed they were forming a government that would endure for ages and dominate

a continent, but it does not appear they worried themselves about the "consent of the governed" outside the States they inhabited, which alone were to participate in political power. They formed a government in which the people of the States were alone represented, and adopted a Constitution which, in its distribution and limitation of powers, applied almost wholly to the States, united or several.

In the early case of *Hepburn* v. *Ellzey* (2 Cranch, 445), (1805), the question came before the Supreme Court whether a citizen of the District of Columbia could maintain an action against a citizen of Virginia. In support of the jurisdiction Mr. Lee insisted that to give the term State a limited construction would deprive the citizens of the District of the general rights of citizens of the United States and put them in a worse condition than aliens; and he put the pertinent question, whether, in the face of the provision that "No tax or duty shall be laid on articles exported from any State," Congress could lay a tax or duty on articles exported from the District of Columbia. But the court properly held that a citizen of the District is not a citizen of a State and can not use the United States courts as such, Chief Justice Marshall saying (p. 452):

> The members of the American confederacy only are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States; and each State shall have at least one Representative. The Senate of the United States shall be composed of two Sena-

tors *from* each State. Each State shall appoint, for the election of the Executive, a number of electors equal to its whole number of Senators and Representatives. These clauses show that the word State is used in the Constitution as designating a member of the Union.

It is obvious that this ruling applies, and indeed it was subsequently held to apply, to the citizens of the Territories.

The States alone are the members of the American confederacy; they constitute the Union, and the Union and the United States are equivalent terms in the Constitution. Thus the Constitution and "the laws of the United States" are made the supreme law of the land (article 6, clause 2), yet Congress is to provide for calling forth the militia to execute "the laws of the Union" (article 1, section 8, clause 15). All legislative powers granted are vested in the Congress "of the United States" (article 1, section 1), but the President is required, from time to time, to give to the Congress information of the state "of the Union" (article 2, section 3).

In the first article, defining the legislative powers, it is provided that "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union." This does not include the Territories, but does operate throughout the United States.

"Duties, imposts, and excises shall be uniform throughout the United States." This, too, is a geographical limitation, requiring indirect taxes to operate

generally throughout the United States—that is, among the several States composing the Union. The history of the adoption of this provision will be found, in interesting form, in the learned opinion of Mr. Justice White, in the recent case of *Knowlton* v. *Moore* (178 U. S., 41), sustaining the constitutionality of the Federal tax on legacies. In the original draft, the provision prohibiting any preference to the ports of one State over those of another and that conferring and limiting the taxing power, were placed together. They really mean the same thing, that the States of the Union shall be treated alike in the regulation of commerce and the imposition of taxes. The uniformity required in each case was a uniformity among the several States of the Union. And this is shown by the decision in the *Cherokee Tobacco Case* (11 Wall., 616), affirming the constitutionality of the act of 1868, extending the excise tax on liquors and tobacco alone to the Indian Territory. A minority of the court (Justices Bradley and Davis) held, in view of the treaty provisions, that it was not the intention of Congress to extend even the tax on liquors and tobacco to the Indian Territory. Obviously, the court was unanimous in the opinion that, although the Indian Territory is within the exterior boundaries of the United States, the provision of the Constitution requiring excises to be uniform throughout the United States does not apply within the Indian Territory, a conclusion which effectually disposes of the dictum in *Loughborough* v. *Blake*.

The Constitution gives Congress power to regulate

28233

commerce "among the several States" and "to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States." This was to remedy the mischief resulting from the diverse and conflicting legislation of the several States, by securing uniform provisions throughout the States of the Union (Federalist. No. 41, Madison.) The early laws of this character applied only within the States. The recent acts have properly been extended to the contiguous Territories which Congress, in its discretion, has seen fit to treat as a part of the United States.

It is provided that "no tax or duty shall be laid on articles exported from any State," but nothing is said about any Territory; and that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another;" but nothing is said about the ports of any Territory.

The prohibitions of the tenth section of the first article apply only to the States: No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or granting a title of nobility. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, etc. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, etc. All these limitations apply only to the States.

In the second article, which grants and defines the executive power, it is provided that Congress may determine the date on which the electors shall give their votes, which day shall be the same "throughout the United States" (article 2, section 1). Necessarily, the United States here means the States of the Union, which alone take part in electing a President. Later it is provided that during his term of office, the President shall not receive in addition to his stated compensation, any other emolument "from the United States, *or any of them*," showing the States alone were in mind.

The third article is devoted to the judicial power of the United States. It has been repeatedly held that the Territorial courts are not organized under this article and are therefore not courts of the United States. This article constantly keeps in mind the relation of the United States to the several States, and of those States and their citizens to one another. No mention is made of Territories or their citizens.

The fourth article guards the rights of each State and its citizens with respect to every other State. The public acts of each shall have full faith and credit in all others. The citizens of each shall be entitled to the privileges and immunities of citizens in the several States. Fugitives from justice shall be surrendered; new States may be admitted into "this Union"; and a republican form of government to every State in the Union is guaranteed. But there is no safeguard or guaranty whatever in the case of a Territory and its

citizens. No republican form of government for the Territories is guaranteed. On the contrary, just preceding the guaranty to the States and following the provision for the admission of new States, the following grant of plenary power is made:

> Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Notice the phraseology. Territory is treated as property, as something distinct from the United States, something belonging to the United States, a subject to be ruled and disposed of by Congress in its discretion as conditions may require, without being hampered by the restrictions which were framed for the States.

The thirteenth amendment contains an explicit recognition of the fact that a place subject to the jurisdiction of the United States is not necessarily a part of the United States, for it provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

There are other provisions to which I might refer if time permitted. I believe a careful examination of the Constitution leads to but one conclusion, that the power of Congress over the Territories is plenary and absolute. Whether it follows from the power to acquire and hold territory, or is conferred by the clause of the Constitution which declares that "Congress shall

have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," it is full and complete, and is unhampered by those limitations and restrictions which were intended to apply only within the States of the Union. There is a line of decisions of the Supreme Court going back to the early days which sustains this view.

Some years after the decision of *Loughborough* v. *Blake*, the case of *Insurance Company* v. *Canter* (1 Peters, 511, 1828) came before the Supreme Court, over which Chief Justice Marshall still presided. A court of the Territory of Florida, composed of a notary and five jurors, had sold a wrecked cargo of cotton on a salvage claim, and transferred the title to Canter, the purchaser. It was insisted that upon the acquisition of Florida it became a part of the United States, over which the Constitution extended, and that under the Constitution admiralty jurisdiction could be exercised only by the courts of the United States. It had to be conceded that the territorial court had not been organized in accordance with the Constitution, which requires judges to be appointed for service during good behavior. Mr. Webster argued the case for Canter, and in behalf of the jurisdiction said (p. 538):

> What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions. The territory and all within it, are to be governed by

the acquiring power, except where there are reservations by treaty.

By the law of England, when possession is taken of territories, the King, *jure coronæ*, has the power of legislation until Parliament shall interfere. Congress have the *jus coronæ* in this case, and Florida was to be governed by Congress as she thought proper.

What has Congress done? She might have done anything—she might have refused a trial by jury and refused a legislature. She has given a legislature, to be exercised at her will; and a government of a mixed nature, in which she has endeavored to distinguish between State and United States jurisdiction, anticipating the future erection of the Territory into a State.

Mr. Webster won his case. The opinion of Chief Justice Marshall is worthy of careful study. Its logic is unanswerable. While the power of Congress to govern ceded territory was declared to be inevitable and absolute, the limitation of the Constitution upon the exercise of the judicial power of the United States was expressly held to be confined to the States, the Chief Justice saying (p. 545):

> Although admiralty jurisdiction can be exercised in the States in those courts, only, which are established in pursuance of the third article of the Constitution, *the same limitation does not extend to the Territories.* In legislating for them, Congress exercises the combined powers of the General, and of a State Government.

The doctrine thus enunciated by the great Chief

Justice has been approved and followed by his successors in a long line of cases, including *Benner* v. *Porter* (9 Howard, 235; 1850), Mr. Justice Nelson; *Clinton* v. *Englebrecht* (13 Wall., 434; 1871), Chief Justice Chase; *National Bank* v. *Yankton* (101 U. S., 129; 1879), Chief Justice Waite; *Murphy* v. *Ramsey* (114 U. S., 15; 1884), Mr. Justice Matthews; *Mormon Church* v. *United States* (136 U. S., 1; 1890), Mr. Justice Bradley; *McAllister* v. *United States* (141 U. S., 174; 1891), Mr. Justice Harlan; and *Shively* v. *Bowlby* (152 U. S., 1; 1894), Mr. Justice Gray.

Chief Justice Waite speaks of the Territories as "the *outlying dominion* of the United States," an apt phrase. He says that Congress "may do for the Territories what the people, under the Constitution of the United States, may do for the States," the fullest and clearest expression of sovereign power without limitation. Mr. Justice Matthews says that "the people of the United States, as sovereign owners of the National Territories, have *supreme power* over them and their inhabitants." "It rests with Congress to say whether, in a given case, any of the people, resident of the Territory, shall participate in the election of its officers or the making of its laws." Mr. Justice Bradley says that "It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired." Mr. Justice Harlan says that "the whole subject of the organization of Territorial courts, etc., was left by the Constitution with Congress under its plenary power over the Terri-

tories of the United States." And then he inquires, "Has Congress under 'the general right of sovereignty' existing in the Government of the United States as to all matters committed to its exclusive control, including the making of needful rules and regulations respecting the Territories of the United States, *any less power* over the judges of the Territories than a State, if unrestrained by its own organic law, might exercise over judges of its own creation?" And Mr. Justice Gray says that "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition."

Are there then no limitations on this plenary power of Congress to govern the Territories? I believe there are.

If there are any who believe that the President or Congress can govern the new possessions outside the Constitution and wholly irrespective of all its limitations, I am not of them. Neither the Executive, nor legislative nor judicial branches of the Federal Government can act except through a power conferred by the Constitution. Wherever a particular power is exercised the limitation placed upon it by the Constitution must be observed. The Constitution was formed by the people of the thirteen original States. They provided a government, conferred upon it certain

powers, and subjected it, in the exercise of some of these powers, to certain limitations. It expressly prohibited the exercise of certain powers under any circumstances and irrespective of the place where exercised. Moreover, since certain powers were reserved to the States composing the Union, certain limitations and prohibitions were laid upon the States. In any case involving the exercise of a power claimed under the Constitution, the first question is, Was the power granted? and the next is, Under what limitations?

The difficulty of a clear conception of the important question in these cases has been increased by the use of campaign catchwords, of political phrases. "The Constitution follows the flag," is one of these. It is used to make people believe that the Government is contending that the President and Congress, in dealing with the new possessions, avowedly act outside of the Constitution; that the Government claims the Constitution stays here, within the United States, leaving the President and Congress power unlimited and despotic in the new possessions. This claim is designed to put both the President and Congress in a position obnoxious to a liberty-loving people. The position is one they have never taken and do not now occupy. Both the President and Congress concede, as I understand it, that they have no power except under the Constitution, and that they are subject in the exercise of their power to every limitation properly applicable. The Constitution and the flag go together. Wherever the flag flies as the symbol of

the sovereignty of this country, it is raised by an authority created and existing under the Constitution. The flag now floats in the Philippines by virtue of the war and treaty-making power through which we have acquired that territory. It was raised in Porto Rico under the same authority. It waves there now as the symbol of the sovereignty of the Republic over rightfully acquired territory which the Constitution expressly intrusts to the regulation and disposition of Congress. The Constitution is in force in the Philippines and is in force in Porto Rico, but not all of its provisions. Only those provisions operate in these new possessions which the framers of the Constitution intended should apply. Opposing counsel speak of the Constitution as if all its limitations apply everywhere throughout the scope of the authority of the Government it creates. This is not true. The United States in the broadest sense is composed of States and Territories, organized and unorganized. There are certain prohibitions and limitations which clearly apply only to the States as bodies politic. They were not intended to and do not apply to the Federal Government at all. There are other limitations which apply to the General Government when acting within the States united under the Constitution. There are other limitations which apply throughout both the States and the Territories, organized and unorganized. There are other limitations which apply everywhere both within and without the United States in the broadest sense. So after all it is a question of the scope and application of

specific limitations. Because an inapplicable limitation is not in force in the new possessions, it does not follow that applicable prohibitions and limitations can or would be ignored.

To repeat, the United States of America, which Chief Justice Marshall, in *Dixon* v. *United States* (1 Brockenbrough, 177, 181), said is "the true name of that grand corporation which the American people have formed, and the charter will, I trust, long remain in full force and vigor," is a body politic, of which the States alone are integral, constituent parts, they only, as the same Chief Justice said in *Hepburn* v. *Ellzey* (*supra*), being "the members of the American Confederacy," and this governing entity exercises sovereignty over "the American Empire," "Our Great Republic, which is composed of States and Territories." The Territories are not integral parts, but possessions of this "grand corporation." The governing unit, composed of the States, possesses and exercises dominion over the Territories, subject only to the applicable restrictions and limitations of the Constitution. All the provisions of the Constitution do not and can not have uniform operation both within the States and Territories, whose political status and relation to the governing body are so widely different. It is true that every part of the national domain is within the jurisdiction of the Constitution, but it does not follow that every part is subject to all its provisions. Each part is subject to some one or more of them, but all parts are not subject to all of them.

The Territories, not being parts but possessions of the

governing body, are not within the scope or purpose of those limitations and restrictions which were designed to preserve and protect the rights of the States composing the Union. In legislating for the Territories Congress is not limited to jealously guarded national powers, but exercises the combined powers of the general and of a State government. But there are limitations which apply to Congress in exercising the Territorial grant.

Obviously those limitations which are laid upon the exercise by Congress of a special power, irrespective of the place where exercised, do apply, such as those forbidding Congress to pass any bill of attainder, or any *ex post facto* law, or confer any title of nobility. These, as Madison said in the Federalist (No. 43), "are contrary to the first principles of the social compact." The prohibition of slavery operates by express provision everywhere. But these are not the only limitations. It is always to be borne in mind that this is a government framed by the people, among other things, "to establish justice" and "to secure the blessings of liberty." A government thus dedicated to liberty and justice is based on fundamental principles and at all times must show respect for fundamental rights. Outside the limitations of the Constitution its spirit requires the Government to treat all subject to our dominion with justice and equality under the law. Tyranny and oppression can not constitutionally exist under the sovereignty of the Republic, whose founders declared that all men are entitled to life, liberty, and the pursuit of happiness. This is what Mr. Justice Bradley

meant when he said in *Mormon Church* v. *United States* (136 U. S., 1, 44): "Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference, and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." And it was to this Mr. Justice Harlan referred in *McAllister* v. *United States* (141 U. S., 174, 188), when he said: "How far the exercise of that power [the power to govern the Territories] is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire;" and then he quotes the language of Mr. Justice Bradley, which I have just read.

But these essential principles upon which our Government rests, these fundamental limitations in favor of personal rights, do not compel the President and Congress to provide trial by jury in Territories where the jury system is unknown and where no proper juries can be had, or to let crime go unpunished. It is true that, in the case of *Callan* v. *Wilson* (127 U. S., 540; 1887), it was held that under the Constitution a man accused of a misdemeanor committed in the District of Columbia, involving the punishment of imprisonment, was entitled to a trial by jury. The case was rightfully decided, because the District of Columbia had once been a part of Maryland and

therefore a part of the United States under the Constitution. The guarantee having once attached, was never withdrawn. Moreover, by the act of February 21, 1871 (16 Stat., 419), Congress enacted that the Constitution and laws of the United States should have full force and effect in the District. But the cases of *Webster* v. *Reid* (11 How., 437; 1850), and *Reynolds* v. *United States* (98 U. S., 145; 1878), which are cited in *Callan* v. *Wilson*, are not authorities upon the point that the limitations of the Constitution respecting trial by jury apply, *ex proprio vigore* and without Congressional action, to the Territories. The first case (*Webster* v. *Reid*) arose in the Territory of Iowa and involved the right of trial by jury in a civil action, but the court points out in the opinion that the organic law of this Territory, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787, over the Territory, thus guaranteeing the right of trial by jury involved in the case. And in the second case (*Reynolds* v. *United States*), arising out of a conviction in Utah for bigamy, while the court did hold that the accused was entitled to a trial by jury, it is to be observed that Congress, by the act of September 9, 1850, had extended the Constitution and laws of the United States over the Territory, and thus confirmed by statutory enactment the right involved.

In the later case of *American Publishing Co.* v. *Fisher* (166 U. S., 464; 1897), while the court held that the Territorial law of Utah authorizing a verdict

when nine or more jurors concurred, was invalid, the decision was virtually placed upon the ground that Congress had, by the act of September 9, 1850, "extended" the Constitution and laws of the United States over the Territory and subsequently enacted that no party should be deprived of the right of trial by jury. Mr. Justice Brewer points out (p. 466) that the cases of *Webster* v. *Reid* and *Reynolds* v. *United States* do not conclusively establish the proposition that the seventh amendment guaranteeing a trial by jury in a civil suit operates *ex proprio vigore* within the Territories. It is, he says, "matter of dispute." "The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases," said Hamilton in The Federalist (No. 83).

The recent case of *Thompson* v. *Utah* (170 U. S., 343; 1898) turns upon one point simply, the *ex post facto* character of the State law of Utah, providing for a jury of eight, when applied to a crime committed in Utah when a Territory, and when, under the Territorial law, the accused was entitled to a trial by a jury of twelve.

On the other hand, the Supreme Court has held, over and over again, that the States may do away with indictment by a grand jury and trial by a petit jury in criminal cases, and that no fundamental rights under our Constitution or form of government are violated by so doing. (*Hurtado* v. *California*, 110 U. S., 516; 1884; *Maxwell* v. *Dow*, 176 U. S., 581; 1900.)

In the line of decisions between these two cases, it has been repeatedly held that the first ten Amendments operate as limitations upon the power of the General Government only, and do not restrict the powers of the several States; also, inevitably, that the right to be indicted by a grand jury and tried by a petit jury is not a privilege or immunity of a citizen of the United States.

In a recent address, a portion of which I understand has been brought to the attention of the court, a distinguished statesman and lawyer affects to believe that if the view of the Government is correct, Congress could, without constitutional objection, pass a Porto Rican act providing for a number of shocking things. The Government has never asserted and does not believe that Congress has the power of a despot in Porto Rico. "The fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments," referred to by Mr. Justice Bradley, stand in the way of everything suggested which shocks the moral sense. Congress could not pass any *ex post facto* law, or declare an attainder, or grant any title of nobility, or provide for the trial or punishment of treason other than in the way marked out by the Constitution, all these things being prohibited by direct and applicable provisions. If the first ten amendments do not limit, by direct application, Congress in legislating for our new possessions, neither do they operate within the States which compose the Union. As this court, speaking by Chief

Justice Waite, said in *United States* v. *Cruikshank et al.* (92 U. S., 541, 552):

> The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the Government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone.

"Protection to life, liberty, and property rests primarily with the States," as Chief Justice Fuller said in *In re Kemmler* (136 U. S., 438, 448). "The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws," said Mr. Justice Catron in *Permoli* v. *First Municipality* (3 How., 589, 609). The Constitution forbids the States to pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or to grant any title of nobility, and the fourteenth amendment provides that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; but outside the range of these limitations the people of the State, through its constitution and laws, are supreme. They can define treason against the State as they see fit; they can limit the freedom of speech and of the press; they can restrict the bearing of arms; they can provide for the

28303

quartering of troops; they can regulate the right of search and of arrest; they can provide for the trial of capital or otherwise infamous crimes upon information and without indictment, and without a jury, and they have done so. They can do away with the trial of civil suits by a jury. And they may do many other things which I need not enumerate.

The right of the people of the States to change their laws and system of procedure so as to make them conform to changed views of administration, or the exigencies of their social life, has been sustained. If the constitutional guarantees relating to indictment by a grand jury and trial by a petit jury are not fundamental in character, and therefore do not tie the hands of the inhabitants of a Territory when organizing a State, why should they tie the hands of the President and Congress in preserving order and protecting life and property in our new possessions?

It is a strange contention that as soon as the treaty went into effect the power of the President and Congress to preserve order in the new possessions ceased. There were no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law, and yet, if the limitations intended for the States at once of their own force applied in these new possessions, crime could be punished in no other way. The Constitution which gave the United States the power to acquire territory by treaty, and imposed upon Congress the duty of disposing of and governing it, did not leave the National Government helpless by demanding

impossibilities. Until the progress of the people of these Territories will permit of the organization of courts and juries after our system, these guarantees must be held inoperative, or the preservation of peace and order and the protection of life and property be abandoned. The situation resembles that discussed in the case of *In re Ross* (140 U. S., 453), where a conviction of murder by a consular court in Japan, acting without a jury and upon information, was sustained, Mr. Justice Field saying (p. 464):

> And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution.

In dealing with our new possessions, due regard for their traditions should be shown. They have been accustomed to the jurisprudence of the civil law. It would be the height of tyranny and oppression to compel them to abandon it without good cause. In providing them a system of local government, should we not keep in mind what Mr. Justice Brown, speaking for the court, said in the recent case of *Holden* v. *Hardy* (169 U. S., 366, 389):

> In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is

that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had no previous acquaintance or sympathy.

V.

DUTIES COLLECTED IN THE UNITED STATES ON GOODS BROUGHT FROM PORTO RICO AND IN PORTO RICO ON GOODS BROUGHT FROM THE UNITED STATES, THE REVENUE TO BE USED FOR INSULAR PURPOSES, UNDER THE PORTO RICAN ACT WHICH TOOK EFFECT MAY 1, 1900.

THE PORTO RICAN ACT.

The act of April 12, 1900 (to take effect May 1, 1900), being an act "temporarily to provide revenues and a civil government for Porto Rico," contains the following provisions:

The second section provides that on and after the passage of the act the duties imposed by the Dingley law on goods brought into the United States shall be levied and collected on all articles imported into Porto Rico from ports other than those of the United States, with these exceptions:

First. In order to protect the Porto Rican coffee industry, *a duty of five cents per pound is levied on all coffee* in the bean or ground imported into Porto Rico.

Second. In order to carry out the provisions of the treaty of Paris, Spanish scientific, literary, and artistic works are to be admitted free of duty for ten years from the ratification of the treaty.

Third. In order to place American publications on the same footing, all books and pamphlets printed in the English language shall be admitted into Porto Rico free of duty when imported from the United States.

As a temporary measure to provide revenue for Porto Rico until the government established by the act shall put in operation a system of local taxation, the third section provides that all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall pay 15 per cent of the duties imposed by the Dingley Act on merchandise imported from foreign countries; and, in addition thereto, articles manufactured in Porto Rico coming into the United States must pay a tax equal to the internal-revenue tax imposed in the United States upon like articles there; and articles manufactured in the United States coming into Porto Rico must pay a tax equal to the internal-revenue tax imposed in Porto Rico upon like articles of Porto Rican manufacture. These taxes are to be paid upon withdrawal for consumption and sale by internal-revenue stamps under regulations to be promulgated by the Commissioner of Internal Revenue. It is provided that all merchandise, except coffee, not dutiable under the Dingley Act, and all merchandise free of duty in Porto Rico under the military orders, shall be admitted free of duty when imported

into Porto Rico from the United States. The temporary and local character of the 15 per cent duty appears in the provision at the close of the section, that whenever the legislative assembly of Porto Rico created by the act shall have put into operation a system of local taxation sufficient to meet the local needs, and shall notify the President, he shall make proclamation thereof, and thereupon "*all tariff duties on merchandise and articles coming into Porto Rico from the United States or coming into the United States from Porto Rico shall cease.*" And it is further provided that "*in no event shall any duties be collected after the first day of March, 1902, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico.*"

The fourth section provides that the duties and taxes collected in Porto Rico, less the cost of collection, and the gross amount of duties and taxes collected in the United States upon articles coming from Porto Rico, "shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President *to be used for the government and benefit of Porto Rico* until the government of Porto Rico herein provided for shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico." As soon as the civil government in Porto Rico shall have been organized the collections of duties and taxes in Porto Rico "shall be paid into the treasury of Porto Rico, to be expended as required by law for the

government and benefit thereof, instead of being paid into the Treasury of the United States."

It is unnecessary to state the general provisions for the organization of the government of Porto Rico. In general the act provides that all inhabitants of Porto Rico who were Spanish subjects at the time of the treaty and did not elect to preserve their allegiance to the country of Spain, and their children born subsequent to the treaty "*shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States.*" They, together with such citizens of the United States as may reside in Porto Rico, "shall constitute a body politic under the name of the people of Porto Rico" (section 7).

The executive power is vested in a governor, a secretary, an attorney-general, a treasurer, an auditor, a commissioner of the interior, and a commissioner of education, appointed by the President with the advice and consent of the Senate (sections 17, 18). The six officers last named, together with five other persons appointed by the President, constitute an executive council.

The legislative power is vested in a legislative assembly consisting of two houses, one of the executive council and the other a house of delegates consisting of thirty-five members, elected from seven districts, each district having five members (sections 27, 28). The legislative authority vested "shall extend to all matters of a legislative character not locally inapplicable" (section 32). All laws enacted are to be

reported to Congress, "which reserves the power and authority, if deemed advisable, to annul the same."

The judicial power is vested in the existing courts and tribunals, with authority to the legislative assembly "to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish," etc. (Section 33.)

The act also constitutes Porto Rico a judicial district, to be called "the district of Porto Rico." For this there is to be appointed a district judge, a district attorney, and a marshal. The district court is to be called "the district court of the United States for Porto Rico," and is to have, in addition to the ordinary jurisdiction of the district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States." (Section 24.)

It is provided that all expenses that may be incurred *on account of the government of Porto Rico* for salaries of officials and the conduct of their offices and departments, and all expenses and obligations contracted for the internal improvement or development of the island, *shall be paid by the treasurer of Porto Rico* out of the revenues in his custody. (Section 12.)

The following limitation is placed on the legislative assembly in raising revenue:

> No export duties shall be levied or collected on exports from Porto Rico; but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be

provided and defined by act of the legislative assembly. (Section 38.)

The temporary character of the act is emphasized by its closing section, which provides that a commission, to report within one year from the passage of the act, shall be appointed by the President, to compile and revise the laws of Porto Rico, and to frame and report "such legislation as may be necessary to make a simple, harmonious, and economical government, establish justice and secure its prompt and efficient administration, inaugurate a general system of education and public instruction, provide buildings and funds therefor, *equalize and simplify taxation and all the methods of raising revenue*, and make all other provisions that may be necessary to secure and extend the benefits of a republican form of government to all the inhabitants of Porto Rico."

REASON AND OBJECT OF THE LAW.

Senator Foraker, who was the chairman of the Senate committee in charge of the Porto Rican bill, in a speech delivered in the Senate on April 30, 1900, describes with clearness the situation which led to the passage of the bill and epitomizes its provisions and purposes. He says that the committee found upon investigation that a civil government should be at once established in Porto Rico, and they found that this government would require for its support not less than about $3,000,000 annually.

They found also that an additional million dollars would be required to support the mu-

nicipal governments of the island, making an aggregate of not less than $4,000,000.

They found that the total valuation of property of all kinds situated in the island would not exceed, for taxation purposes, $100,000,000.

They found that this property was already burdened with a private debt, evidenced by mortgages on record to the amount of about $26,000,000 of principal, with an accumulation of several years' interest at extravagant rates, that swelled the sum to probably $30,000,000.

The committee further found that no system of property taxation was in force in the island, or ever had been, and that it would require at least a year, and probably two years, to inaugurate one and secure returns from it, and that, inasmuch as the people had no familiarity with such a system, it would be difficult, probably, to enforce it, at least for a time.

The committee also found that the public revenues of the island, except only such as were raised by a burdensome and complicated excise tax on incomes and business vocations, had always been chiefly raised by duties on imports and exports, a system with which the people were therefore familiar.

The committee further found that this system was already in operation, and that revenues were then and constantly being collected, upon which, so far as they went, the government could at once depend.

The committee further found that our internal-revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests.

Thousands of persons in that island, as the testimony shows, are engaged in the manufacture of cigarettes and cigars in a small way; and rum, which is almost universally used—not so much as a beverage as for other purposes—is a species of distilled spirits which is sold in almost every store, grocery, and public place. To undertake to collect our heavy internal-revenue taxes—far heavier than Spain ever imposed—on these products and vocations would be to invite violations of law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and good will of that people for the United States.

The committee also found that the coffee grown in Porto Rico is of the highest grade and quality, and that it has always been protected by a tariff duty high enough to keep out of Porto Rico the cheap and low grades of coffee grown in Central and South America. We do not grow coffee, and therefore we admit it into the United States free of duty.

Here, then, to recapitulate, was the situation:

A civil government was a necessity. It must have $3,000,000 for its support, and the municipalities must have at least one million more.

There was no system of direct taxation of property in operation. There was no time to establish one. Moreover, if there had been time, such a system would have entailed upon that people an impossible burden.

Four per cent, or even 3 per cent, is too burdensome a tax rate to impose upon the property of even the most prosperous State in the

Union. To impose it on Porto Rico would mean only disaster, failure, bankruptcy, and despair.

In view of these considerations, we decided, first, that we would find some way to exempt the people of that island from the direct taxation of their property, such as every other State and Territory of the Union has always been subjected to. The generosity of this proposition was far greater and more helpful than that recommended by the President. No such favor has ever been shown to any other people for whom we have legislated.

We next decided, for the reasons already given, that we would not, for the time being, undertake to apply and enforce our internal-revenue laws in the island, but, except on merchandise imported into the United States, we would exempt the people of Porto Rico therefrom—another unprecedented favor, never before shown to anybody—and, in the third place, we decided that we would protect their coffee, which constitutes their chief industry and amounts to more than two-thirds of their exports, from injurious competition by levying a duty of 5 cents a pound on all coffee imported into Porto Rico; and then, finally, we determined that there should be collected on all goods imported into Porto Rico from foreign countries tariff duties as provided by the tariff laws of the United States; but that, instead of turning this money over to the National Treasury for the benefit of the United States as we have always heretofore done to every other

Territory, we would turn it over to Porto Rico for the benefit and support of its government.

We then found, according to the best estimates we could make, that when all this had been done there would remain a large deficiency, amounting to from $1,000,000 to $1,500,000.

The question, then, was how further we could raise revenue without directly taxing the property of the island to meet this deficiency; and we found that we could, in our opinion, best accomplish this by leaving a light tariff duty upon the commerce between the United States and Porto Rico; and so we finally concluded, and provided in the bill, that instead of absolute free trade, which all desired, as well as the President, we would for a short time, until the local government could be put in operation and devise a system of taxation for its support, reduce the tariff on dutiable goods coming from Porto Rico into the United States only 85 per cent, instead of entirely remitting it, and that we would for the present allow all food products and necessaries of life, farm implements, machinery, etc., to enter Porto Rico free of duty; but on other articles, whatever they might be, we would reduce the Dingley rates only 85 per cent. You hear constantly of our putting on commerce with Porto Rico a tariff of 15 per cent, when the truth is we removed all but 15 per cent. We did not add or increase, but reduced and remitted.

We expressly provided, however, that on and after March 1, 1902, there shall be absolute free trade between Porto Rico and the United States, and that there shall be such free trade

sooner—in a year, six months, or ninety days, possibly—whenever the local government shall have provided otherwise for its necessary revenues, and that in the meanwhile all collections, both those to be made in Porto Rico and those to be made in the United States, shall be paid over to Porto Rico for the support of its government without placing an additional burden upon the already overburdened lands and property of the island.

No such liberal and generous government as to revenues was ever given by this nation or any other to any Territory or colony. It far surpassed all recommendations and all expectations. It should be further stated that an analysis of the articles constituting this trade shows that this tax so imposed would be borne almost exclusively by the sugar and tobacco interests, more able than any others to bear it without feeling any burden.

Manifestly Congress intended, by the passage of the Porto Rican act, not to recognize or treat the island as a part of the United States, but as a possession thereof, with a political existence under the sovereignty, but outside the limits of, the United States. The inhabitants of Porto Rico are made "citizens of Porto Rico, and as such entitled to the protection of the United States." A temporary civil government is provided, with a revenue system quite separate and distinct from that of the United States. The duties provided by the act, both on goods coming into the United States from Porto Rico and on goods coming into Porto Rico

from the United States, "shall be used for the government and benefit of Porto Rico." The taxation, therefore, is of a purely local nature; it can not be said that the revenues derived from these duties were to be used "to pay the debts and provide for the common defense and general welfare of the United States."

These duties are not laid by Congress under the general grant of taxing power contained in the first clause of section 8 of article 1, but under the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." If the limitation contained in the general grant of taxing power applies in the collection of these insular duties within the United States, I submit it is fully complied with, because the duties on goods coming from Porto Rico are uniformly exacted throughout the United States in every port where the goods are received. Congress has determined that these revenue regulations for Porto Rico are needful. This determination is conclusive, and sustains the exercise of the power, unless there be some other prohibition or limitation which prevents.

The only other provision suggested as applicable is that which provides that "No tax or duty shall be laid on articles exported from any State." The only goods which could possibly be regarded as articles exported from any State are the goods which are imported into Porto Rico from the United States. But these goods are not exports from any State; they are imports into Porto Rico. An article of export from any State, within

the meaning of this provision, is an article shipped from the United States to some foreign port. (*Woodruff* v. *Parham*, 8 Wall., 123.) A duty laid on exports is a duty laid upon the goods at the time they are shipped abroad, and because of that fact. When goods are received at the foreign port they cease to be exports and become imports, and a tax then laid upon them because of their being brought into the foreign country is not a tax upon exports but a duty upon imports. They are taxed, not because they have been shipped out of the country where they were sold, but because they have been shipped into the country where they were bought.

I have recently, in the case of *Fairbanks* v. *The United States*, discussed the meaning and effect of the prohibition in question. At the time the Constitution was being framed there were no articles of export produced generally throughout the Union. The great staples of the South were not produced to any substantial degree in the North. And the reverse was true. It was apparent, therefore, in view of this variety in the production of articles for export, that it would be impossible, in the application of an export duty, to select articles for taxation so as to secure and preserve uniformity of burdens as among the several States. An export tax on cotton would fall on the South, and, with the knowledge then existing, could not be counterbalanced by an export tax on any product of the North. To give Congress the power to lay a tax or duty "on articles exported from any State"

meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South this clause was inserted in the Constitution. The prohibition was applied, not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some States and in favor of others.

1 G. T. Curtis's Const. Hist. U. S., p. 494.
Rawle on the Constitution, p. 115.
1 Story on the Constitution, sec. 1014.
Tucker on the Constitution, vol. 1, p. 469.

I am at a loss to perceive how these duties on goods brought into Porto Rico from the United States could properly be held to violate the Constitutional provision under consideration. They are not levied when the goods are exported or at the place of exportation nor because of the exportation, but are levied when the goods are imported at the port where received and are paid by the importer.

It may further be suggested that within the decision in *Woodruff* v. *Parham*, goods shipped from the United States to Porto Rico are not exports. The commerce between Porto Rico and the United States since the passage of the Porto Rican act is not foreign, but,

in a sense, domestic commerce. It is commerce passing between countries under the sovereignty of the United States—commerce which is regulated by Congress, not under the power to regulate commerce either among the several States or with foreign nations, but under the power to pass all needful rules and regulations respecting the territory or other property belonging to the United States. Authority to regulate this insular possession includes authority to regulate its commerce both with foreign countries and with the United States. Commerce is always a rightful subject of regulation by the governing body. It is true that the Constitution places certain limitations upon the power of Congress to regulate the commerce of the States. While Congress is given express power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," it is provided that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" but, obviously, this Porto Rican act gives no preference to the ports of one State over those of another. All States are treated alike. Goods going into Porto Rico pay a certain duty there, no matter from what State or port shipped, and goods coming into the United States from Porto Rico pay a certain duty here, no matter to what port or State shipped.

It is true the Constitution declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," but I fail to perceive in what way the rights of citizens of

any State are infringed by the provisions of the Porto Rican act. All are treated alike with respect to Porto Rico. Moreover, no privilege or immunity granted to the inhabitants of Porto Rico by the treaty of Paris is infringed by this legislation, for the treaty itself expressly provided that their civil rights and political status should be determined by Congress, and Congress has declined to make them citizens of the United States, restricting their rights to those of "citizens of Porto Rico entitled to the protection of the United States." As such, Congress, in the Porto Rican act, has framed a measure peculiarly adapted to raise the insular revenues in the easiest way, thus avoiding the imposition of burdens which would become intolerable if the revenue laws of this country were extended to them.

Before the adoption of the Constitution the States had severally the power to lay imposts and duties on imports or exports, and exercised it. The Constitution forbade the further exercise of this power without the consent of the Congress, and unless the net proceeds of all duties and imposts so laid should be applied for the use of the Treasury of the United States, the clause reading as follows (clause 2, section 10, article 1):

> No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be

> for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

This seeming prohibition is equivalent to a grant of authority to a State to lay imposts or duties on imports or exports, provided Congress shall consent, upon the condition that "the net produce" of such duties shall be "for the use of the Treasury of the United States;" and it is a recognition of the fact that the needs of both a State and of the United States might be promoted by special duties on the imports or exports of a State. The condition thus recognized and provided for in the case of a State has been legislated for by Congress, which possesses both Federal and State jurisdiction in the case of Porto Rico.

It may be insisted that the constitutional provision which requires all duties, imposts, and excises to be uniform throughout the United States, lays down a fundamental rule of taxation applicable everywhere; that no special system of taxation to meet the conditions and needs of a particular territory or possession, can be framed by Congress, but that all duties and excises must be laid uniformly throughout all the territory over which the sovereignty of the United States extends. There was a good reason for requiring duties and excises to be uniform throughout the States of the Union, and that reason is stated clearly in the opinion of the court in *Knowlton* v. *Moore* (178 U. S., 41). But there is neither reason nor justice in requiring the same taxes to be imposed wherever the flag

flies. The collection of our internal-revenue taxes is impossible and impracticable in Porto Rico and the Philippines. They were framed to meet conditions here; they would be ruinous there. We are not engaged at present in collecting taxes in Porto Rico for the benefit of the United States. The only taxes collected are used for the benefit of Porto Rico. Of course, Porto Rico receives the benefit of the general revenues to a certain degree, for the General Government is there with its agencies supported at the general expense, and it would be only fair, if Porto Rico could stand it, to make her bear her fair share of the national burdens in return for the benefit she receives. But after all, the entire matter is left with Congress, and the uniform imposition in Porto Rico of the national system of taxation would not relieve the island from the necessity of responding to further exactions should Congress deem them necessary in order to meet the local expenses of the government of the island. Congress possesses over Porto Rico, to use the language of Mr. Justice Gray, speaking for the court in *Shively* v. *Bowlby* (152 U. S., 1), "the entire dominion and sovereignty, national and municipal, Federal and State." What good purpose could be served, then, by attempting to apply in Porto Rico the provision that Federal taxes shall be uniform throughout the States? It is all right to require the Federal taxes to be uniform throughout the States. This secures a uniform contribution from the States for a uniform benefit. Only the national taxes are raised in the States by the Federal authority. The States raise

their own State and county and municipal taxes. They regulate these to suit themselves. Congress has no say about them. But in Porto Rico Congress has power to raise not merely national but all insular revenues—everything needed to carry on the local governments. It is not necessary, as I understand it, that in raising taxes in a Territory Congress should distinguish between the purposes to which the taxes are to be applied and levy specific taxes for national purposes and levy other taxes for local purposes. Especially is this true before a Territorial government has been organized and has established and put in operation a system of local taxation. Congress may and must necessarily combine the sources of revenue and apply the proceeds as the circumstances require. The power and the necessity of doing this prevents any just comparison between the revenue system established by Congress in a Territory and that in force for purely Federal purposes in the States.

Respecting the Territorial governments, with their courts and laws, Mr. Justice Nelson, speaking for the court, said in *Benner* v. *Porter* (9 Howard, 235, 242):

> They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.

The unlimited power of local taxation within the Territories is well illustrated in the case of *Thomas* v. *Gay* (169 U. S., 264), in which the validity of an act of the legislature of Oklahoma taxing cattle grazed on the Osage Indian Reservation within the Territory, but which by treaty stipulation was never to be included "within the territorial limits or jurisdiction of any State or Territory," was sustained by this court. Of course what may be done by the Territorial government, under authority of Congress, in the raising of local revenue, may be done by Congress directly, if it sees fit, and especially pending the organization of a local government, as in the Porto Rican case.

With regard to the matter of taxation in Porto Rico it is quite pertinent to put the question which Mr. Justice Harlan, speaking for the court, put in the case of *McAllister* v. *United States* (141 U. S., 174, 190) respecting the power of Congress over the courts of a Territory:

> Has Congress, under "the general right of sovereignty" existing in the Government of the United States as to all matters committed to its exclusive control, including the making of needful rules and regulations respecting the Territories of the United States, any less power over the judges of the Territories than a State, if unrestricted by its own organic law, might exercise over the judges of its own creation?

In other words, to paraphrase this, has Congress, under "the general right of sovereignty" existing in the Government of the United States as to all matters

committed to its exclusive control, including the making of needful rules and regulations respecting the Territories of the United States, any less power in raising territorial revenue than a State, if unrestrained by its own organic law, might exercise in raising revenue within its borders?

In the Constitution of the United States, in the legislation of Congress, in the decisions of this court, the distinction has been drawn in pertinent cases between "the United States" and the Territories thereof. Many instances of the distinction thus drawn have been given in the elaborate briefs filed by the Attorney-General. I desire in this connection to refer to one or two more.

The Constitution forbade Congress to prohibit the importation of slaves into the States prior to 1808. The act of March 2, 1807 (2 Stat., 426), prohibiting the importation of slaves into this country provided that it should be unlawful for any person to import or bring "*into the United States or the Territories thereof*" from any foreign country any negro, etc. And the second section of this act made it unlawful to equip a ship for the slave trade, not in any port or place of the United States, but "*in any port or place within the jurisdiction of the United States.*"

This phraseology was preserved in the act of April 20, 1818 (3 Stat., 450), which supplemented the act of March 2, 1807. The first section provided that it should be unlawful to import any negroes "*into the United States or Territories thereof*" while the fifth section prohibited any person from owning any slaves

imported or brought "*into the United States or the Territories thereof.*" The act further provided that no vessel should be equipped for the slave trade "*in any port or place within the jurisdiction of the United States.*"

In *Miner's Bank* v. *Iowa* (12 Howard, 1), the Supreme Court held that the validity of a Territorial act repealing the charter of a bank granted by a Territory, could not be brought before the Supreme Court under the twenty-fifth section of the Judiciary Act, either on the ground that there was drawn in question the validity of a statute of, or an authority exercised under, any State, or on the ground that there was drawn in ques- the validity of a statute or authority exercised under the authority of the United States. In holding there was not drawn in question the validity of an act passed by a State, the court, speaking by Mr. Justice Daniel, said, page 7, (quoting partly from *Scott* v. *Jones*, 5 Howard, 343):

> "In order to give this court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a *State* a member of the Union, and a public body owing obedience and conformity to its constitution and laws. That if public bodies, not duly admitted into the Union, undertake as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the States or Territories within which these bodies are situated and acting; but their measures are not examinable by this court

upon a writ of error. They are not *States*, and can not pass statutes within the meaning of the judiciary acts." Other cases cited by the court, in the opinion just quoted, might be adduced to show the difference ever taken by the court in reference to its relation *to the States as States, and as contradistinguished from the Territories of the United States. It seems to us that the control of these Territorial governments properly appertains to that branch of the Government which creates and can change or modify them to meet its views of public policy, viz, the Congress of the United States.* That control certainly has not been vested in this court, either in mode or substance, by the twenty-fifth section of the judiciary act.

In holding that the Territorial charter should not be regarded as an act of Congress, the court said (p. 8):

> The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it (and according to which it was in fact organized), by the legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it, as we are urged to do by the argument for the plaintiff in error, would constitute it rather a bank of the United States, *situated without the United States, and operating within the Territory of Wisconsin.*

And this language is quoted with approval by the Supreme Court in the case of *Lyons* v. *Woods* (153 U. S., 649, 661).

VI.

DUTIES COLLECTED UNDER THE DINGLEY LAW ON GOODS BROUGHT FROM HAWAII INTO THE UNITED STATES AFTER THE RESOLUTION OF ANNEXATION OF JULY 7, 1898, AND BEFORE THE TAKING EFFECT OF THE ACT OF APRIL 30, 1900, PROVIDING A GOVERNMENT FOR THE TERRITORY OF HAWAII.

In the famous Canter case, Chief Justice Marshall said that acquired territory "becomes a part of the nation to which it is annexed, *either on terms stipulated in the treaty of cession, or on such as the new master shall impose.*"

In the case of *Fleming* v. *Page* (9 Howard, 602), Chief Justice Taney, after defining the war-making power of the President, said (p. 615): "But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power." And in the same case, regarding the power of acquiring territory, the Chief Justice said (p. 614):

> The United States, it is true, may extend its boundaries by conquest or treaty, * * * but this can be done only by *the treaty-making power or the legislative authority.*

The annexation of territory is a matter which rests with the treaty-making or legislative power. Either may annex territory, and the power which has authority to annex may fix the conditions upon which the territory shall be annexed. If it is desirable to treat the annexed territory as a part of the United States in the legislative sense, so that the customs laws of the

United States shall be applied to it, it is for Congress to say when and under what circumstances this shall be done.

In the case of Hawaii it was obviously the intention of Congress, as soon as practicable, to treat the territory as a part of the United States for legislative purposes, so that the revenue and commercial laws which apply in the United States should operate there. But before these laws could be put in operation in the Hawaiian Islands, it was necessary that a period of preparation should intervene after the passage of the resolution of annexation. On July 7, 1898, when the annexation resolution was passed, there were no customs laws of the United States in operation in Hawaii, and no customs officers of the United States there. The customs laws of the Republic of Hawaii were in force, and they were the only laws of that character. It is obvious, therefore, that if the resolution of annexation immediately abrogated the customs laws of the islands, the territory would have been left without any customs law, open to the ships of the world. The customs laws of the United States could not have effective operation, because there were no agencies there to enforce them.

If, then, the resolution of annexation threw open the ports of Hawaii to the world, at the same time, according to the contention of opposing counsel, it threw open the ports of the United States to ships coming from Hawaii. The effect of this would have been to give an open door through Hawaii into our ports. We

could not inquire, when goods came into the United States from Hawaii, whether they had been brought into Hawaii as an *entrepôt* to the United States. If the constitutional argument which we have to meet is correct, the mere fact that the goods came from Hawaii would be sufficient to give them free entrance into the United States.

Obviously, this sort of thing could not be permitted. I venture to say that if Congress had believed such would be the inevitable consequence of the passage of the resolution, the resolution would not have been passed at the time it was passed. It would not have been passed until the necessary steps had been taken to put in operation in Hawaii immediately our customs and commercial regulations. And here we would be met by the suggestion that we could not expect the Republic of Hawaii to permit our officers to go there, and prepare to put our laws in operation, until there had been an authoritative declaration of the purpose of the United States to annex the territory. And, moreover, no department of the United States would have been authorized to send agencies to Hawaii for the purpose mentioned until the treaty-making power or Congress had made a definitive and binding declaration of the intention of the Government to annex the territory.

For these reasons the resolution of July 7, 1898, with respect to customs regulations was of a declaratory and preliminary nature. Congress had the right to say upon what terms Hawaii should be taken in,

and these terms were definitely fixed by the resolution. So far as customs matters was concerned, the islands were not to be deemed a part of the United States until Congress should further legislate on the matter by a law extending the United States customs laws and regulations to the islands.

It is true that the resolution declared:

> The Hawaiian Islands and their dependencies be, and they are hereby annexed as a part *of the territory* of the United States, and are subject to the sovereign dominion thereof.

But it expressly provided, as a method of continuing the existing government pending the action of Congress:

> Until Congress shall provide for the government of such islands, all civil, judicial, and military powers exercised by the officers of the existing government in said islands, shall be vested in such person, or persons, and shall be exercised in such manner as the President of the United States shall direct.

And it further expressly provided:

> Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs regulations of the Hawiian Islands with the United States and other countries shall remain unchanged.

The resolution also provided with respect to the Chinese:

> No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

Yet, if the constitutional contention of the other side is correct, immediately upon the passage of the resolution of annexation, Chinese, who were citizens of the Republic of Hawaii, would have become citizens of the United States, with the right of free entrance here.

Finally, the resolution provided for the appointment, by the President, of five commissioners, "at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper."

The manifest purpose of these provisions was to continue in force in Hawaii the customs laws and regulations of that country, until, after the investigation of the commission, suitable legislation organizing the islands as a Territory of the United States could be framed, and agencies provided for putting in operation there the laws of this country.

Until such time, Hawaii was not to be deemed a part of the United States for customs purposes. The resolution did not annex or make it "a part of the United States." The islands were annexed as "a part *of the territory* of the United States, subject to the sovereign dominion thereof." It is obvious that territory annexed or ceded to the United States becomes "a part *of the territory* of the United States," but it does not become "a part of the United States" in either a constitutional or legislative sense until Congress shall so determine.

The act of April 30, 1900, "to provide a government for the Territory of Hawaii," declares that the

Constitution, except as therein otherwise provided, and laws of the United States not locally inapplicable, shall have the same force and effect in the Territory of Hawaii as elsewhere in the United States. It declares that all persons who were citizens of the Republic of Hawaii on August 12, 1898, are "citizens of the United States and citizens of the Territory of Hawaii." Obviously this provision opened the door into the United States of Chinese who were citizens of the Republic of Hawaii at the time mentioned. The act provides for a local government, makes the Territory an internal-revenue district, a customs district, and a judicial district, with the necessary Federal officers to put such laws into operation.

The ironclad operation of the Constitution in customs matters is repudiated by Congress even in this act, for it provides (sec. 93) that imports from the islands into the United States of dutiable articles not the product of the islands and imported into the islands from a foreign country after July 7, 1898, and before the passage of this act, should pay the same duties that are imposed upon the same articles when imported into the United States from a foreign country.

Of course, this was intended to frustrate any purpose of avoiding the customs laws of the United States by sending goods into Hawaii after the resolution of annexation in anticipation of opening the ports of the United States to merchandise from Hawaii upon the passage of the act organizing that Territory. This provision goes hand in hand with the provision of the

resolution of annexation continuing the customs laws of Hawaii in force, and closing our ports to its goods until the necessary preparations could be made for putting our customs laws and regulations into operation in the islands.

To conclude, Hawaii could not become a part of the United States for customs purposes without the consent of Congress. In the annexation resolution it was expressly provided that the customs regulations of the Republic of Hawaii should continue until Congress should extend the customs laws of the United States to the islands. It was not until the passage of the act of April 30, 1900, that the islands became a part of the United States for customs purposes by the extension of our laws to them.

JOHN K. RICHARDS,
Solicitor-General.

JANUARY 7, 1901.

O